Nik Sharifuddin bin Nik Kadir v Mohaiyani Securities Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D4-24-29 OF 1993
ZAKARIA YATIM J
29 JUNE 1994

***Contract** — Guarantee — Banker's guarantee — To secure due performance of remisier's agreement — Whether unconditional guarantee payable on demand — Whether court could look at underlying contract and conduct of parties*

The plaintiff was a remisier with the defendant, a stockbroking firm. According to the remisier's agreement between the plaintiff and the defendant, the plaintiff was required to place with the defendant the sum of RM50,000 to guarantee the due performance by the plaintiff of his obligations and covenants under the agreement. However, the defendant accepted a banker's guarantee for that amount instead of cash. The plaintiff subsequently purchased 44,000 shares on behalf of a client. Under the terms of trading on the KLSE, a buyer had seven trading days to settle the purchase price. However, the plaintiff alleged that before the seven-day period had expired, the defendant sold the shares without his or his client's knowledge, causing a loss of profits to the client and a deficit in the plaintiff's trading account. The defendant wrote to the plaintiff, asking him to settle the deficit amount, otherwise it would call on the banker's guarantee.

The plaintiff applied for an order to restrain the defendant from encashing the bank guarantee on the ground that but for the defendant's actions, there would not be any deficit in the plaintiff's account and therefore, the defendant had no right to be indemnified. The defendant, on the other hand, alleged that the plaintiff had wrongfully purchased the shares and that he did not have the credit to support the purchase. The issue was whether the banker's guarantee was an unconditional guarantee payable by the bank on demand.

Held, allowing the plaintiff's application:

(1) The banker's guarantee was not an unconditional guarantee, unlike a performance or demand guarantee which is payable on demand without proof or conditions. It was required as collateral by the defendant, ie as a form of security, to guarantee the plaintiff's performance of his obligations and covenants under the agreement. Furthermore, there was no evidence that a demand had been made on the guarantee.

(2) As the guarantee was not unconditional, the court had to look at the underlying agreement. Since there were serious questions to be tried regarding the conduct of the defendant under the terms of the agreement, the defendants should be restrained from

calling on the banker's guarantee. The balance of convenience was in favour of the plaintiff. A

[Bahasa Malaysia summary

Plaintif adalah seorang remisier yang bekerja dengan defendant, sebuah syarikat broker saham. Mengikut perjanjian remisier di antara plaintif dan defendan, plaintif dikehendaki meletak wang sebanyak RM50,000 dengan defendan untuk menggerenti pelaksanaan wajar obligasi dan waadnya di bawah perjanjian itu. Bagaimanapun, defendan telah menerima suatu gerenti bank untuk jumlah tersebut sebagai ganti wang tunai. Plaintif kemudiannya telah membeli 44,000 saham bagi pihak pelanggannya. Mengikut terma perdagangan di BSKL, seseorang pembeli mempunyai tujuh hari untuk membayar harga belian sahamnya. Bagaimanapun, plaintif mengatakan bahawa sebelum tempoh tujuh hari itu luput, defendan telah menjual saham tersebut tanpa pengetahuannya ataupun pengetahuan pelanggannya, lalu menyebabkan suatu kehilangan keuntungan kepada pelanggannya itu dan suatu defisit di dalam akaun perdagangan plaintif. Defendan telah menulis surat kepada plaintif untuk meminta beliau menjelaskan defisit itu, jikalau tidak ia akan membuat tuntutan atas gerenti bank tersebut. B C D

Plaintif telah memohon suatu perintah untuk menahan defendan daripada menunaikan gerenti bank itu atas dasar bahawa kalau tidak kerana tindakan defendan itu, tidak akan terdapat sebarang defisit di dalam akaun plaintif dan dengan demikian, defendan tidak berhak untuk ditanggung rugi. Defendan, sebaliknya, mengatakan bahawa plaintif telah membeli saham itu secara salah dan bahawa beliau tidak mempunyai kredit untuk menyokong pembelian itu. Isunya adalah sama ada gerenti bank itu merupakan suatu gerenti tanpa syarat yang mesti dibayar oleh bank apabila dituntut. E F

Diputuskan, membenarkan permohonan plaintif:

(1) Gerenti bank itu tidak merupakan suatu gerenti tanpa syarat, berbeza daripada suatu gerenti pelaksanaan atau tuntutan yang mesti dibayar apabila dituntut tanpa bukti atau syarat. Ia diperlukan sebagai kolateral oleh defendan, iaitu sebagai suatu bentuk cagaran, untuk menggerenti pelaksanaan obligasi dan waad plaintif di bawah perjanjian itu. Lagipun, tidak terdapat keterangan yang menunjukkan bahawa suatu tuntutan telah dibuat ke atas gerenti itu. G H

(2) Oleh kerana gerenti itu bukan tanpa syarat, mahkamah terpaksa melihat kepada perjanjian yang mendasari gerenti itu. Oleh sebab terdapat persoalan serius untuk dibicarakan berkenaan dengan kelakuan defendan di bawah terma perjanjian itu, defendan seharusnya ditahan daripada menunaikan gerenti bank itu. Imbangan kemudahan memihak kepada plaintif.] I

[*Editorial Note*: The defendant has appealed to the Federal Court.]

Notes

For cases on banker's guarantees, see 3 *Mallal's Digest* (4th Ed) para 1164; [1992] Mallal's Digest 579.

Cases referred to

Australasian Conference Association Ltd v Mainline Constructions Pty Ltd (In Liquidation) & Ors (1978) 141 CLR 335 (folld)

Barclay Mowlem Construction Ltd v Simon Engineering (Aust) Pty Ltd [1991] APCLR 1; (1991) 23 NSWLR 451 (folld)

Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978] 1 All ER 976; [1977] 3 WLR 764 (distd)

Hortico (Australia) Pty Ltd v Energy Equipment Co (Australia) Pty Ltd (1985) 1 NSWLR 545 (refd)

IE Contractors v Lloyd's Bank plc and Rafidain Bank 51 BLR 5 (folld)

Kirames Sdn Bhd v Federal Land Development Authority [1991] 2 MLJ 198 (distd)

Potton Homes Ltd v Coleman Contractors (Overseas) Ltd (1984) 28 BLR 19 (refd)

Premier Tyres Ltd v State Trading Corp of India Ltd (1981) 51 Comp Cas 316 (refd)

Royal Design Studio Pte Ltd v Chang Development Pte Ltd [1991] 2 MLJ 229 (folld)

Sykt Perumahan Pegawai Kerajaan Sdn Bhd v Bank Bumiputra Malaysia Bhd [1991] 2 MLJ 565 (refd)

Legislation referred to

Securities Industries Act 1983

Julian Ding (*Zaid Ibrahim & Co*) for the plaintiff.
June Khoo (*Lainah Yow & Zur*) for the defendant.

Zakaria Yatim J: This is an application by the plaintiff for an order that the defendant be restrained from calling, demanding or encashing the bank guarantee issued by Perwira Habib Bank Malaysia Bhd ('the bank') dated 12 February 1992 (MSB9/CTL/15/92).

The application was made ex parte. At the hearing of the application I ordered that it be heard inter partes, but I made an interim order in terms of prayer 1 of the application until the date of the inter partes hearing.

The plaintiff is a licensed dealer's representative under the Securities Industries Act 1983. The defendant is a stockbroking firm and is a member of the Kuala Lumpur Stock Exchange (KLSE) and carries on its business at 54, Jalan SS21/35, Damansara Utama, Petaling Jaya, Selangor.

The plaintiff commenced dealings as a remisier with the defendant after obtaining his licence. On 14 May 1992, he entered into a remisier's

agreement with the defendant. Clause 2(i) of the agreement provides that the plaintiff, upon the execution of the agreement would place with the defendant a sum of RM50,000 'which shall be used to guarantee the due performance by the remisier of the obligations and covenants under this agreement (hereinafter referred to as 'the security sum')'.

Before the agreement was entered into, the defendant, on 18 February 1992, wrote to the plaintiff informing him that he could commence trading as a remisier after the remisier's agreement had been completed. The letter also stated the condition requiring the plaintiff to place a minimum cash deposit of RM50,000 before trade, but the defendant would accept a banker's guarantee for that amount instead of cash. Paragraphs 2 and 3 of the letter states as follows:

> (1) A banker's guarantee of RM50,000 will be placed with the company as collateral against your trading. Your personal outstanding balances in A/C N1050 will be taken into account when computing your daily trading limits. As a general rule, the trading limit is computed as eight times the total deposits after deducting contra losses.
>
> (2) It is a condition of the company, that remisiers place a minimum cash deposit of RM50,000 before trading. However, in your case, the company will, in the meantime, accept the *banker's guarantee* for RM50,000 instead until such time your contra losses have been fully paid. Thereafter, arrangements must be made to top up the cash deposit either through direct payment or through deductions from your commissions. (Emphasis added.)

Earlier, on 12 February 1992, the bank had in fact issued the banker's guarantee for RM50,000 in favour of the defendant. It was issued at the plaintiff's request. The banker's guarantee is reproduced below:

> 12 February 1992
>
> Attn: Encik Nik Sharifuddin
>
> The Board of Directors
> Mohaiyani Securities Sdn Bhd
> No 54 Jalan SS21/35
> Damansara Utama
> 47400 Petaling Jaya
> Selangor Darul Ehsan
>
> Dear Sirs
>
> Banker's guarantee
>
> As requested by Encik Nik Sharifuddin bin Nik A Kadir, NRIC No 4497861, of No 21 Jalan Setiabakti, Bukit Damansara, 50490 Kuala Lumpur, *we hereby guarantee the sum of RM50,000 (Ringgit fifty thousand only) being the amount of security deposit required to be deposited with you.* This amount shall be paid by us upon demand. (Emphasis added.)
>
> This guarantee is effective from 12 February 1992 until 11 February 1993.
>
> All claims if any in respect of this guarantee shall be made during the validity of the guarantee or within 14 days from the expiry date of the said

guarantee. If no claim is made on or before the aforesaid date then all our liabilities and obligations shall be absolved.

This guarantee must be returned to us for cancellation upon expiry.

For Perwira Habib Bank (M) Bhd

—Sgd—	—Sgd—
Mohammed Abdul Malek (1/035)	Faridah bte Mokhtar (1/404)
Branch manager	Officer

On 7 January 1993, the defendant wrote to the plaintiff informing him that there was a deficit amounting to RM11,321.74 in the plaintiff's account. The plaintiff was asked to settle the amount by 14 January 1993 otherwise the defendant would call on the banker's guarantee. Subsequently, the plaintiff was informed by the bank that the defendant had taken steps to call on the banker's guarantee.

The plaintiff, in his affidavit (encl 3) in support of the application, averred that on 11 December 1992 he was instructed by his client to purchase 44,000 shares of Sanda Plastics Industries Bhd ('the said shares'). The purchase price ranged from RM4.22 to RM4.28 per share. Under the terms of trading of shares on the KLSE, settlement of the purchase price by a buyer was to be made within seven trading days of the transaction, excluding Saturdays, Sundays and public holidays. He said that his client had until 21 December 1992 to settle the outstanding purchase price. He alleged that, contrary to the KLSE terms of trading and settlement, the defendant, on 14 December 1992, sold the said shares without his or his client's knowledge or consent. On the same day, that is 14 December 1992, the defendant unilaterally varied the terms of the remisier's agreement purporting to give themselves the unilateral right to sell without the consent of the plaintiff's client. The price of the said shares was at its highest at RM6.20 per share. If the defendant had not sold the said shares on 14 December 1992 the plaintiff's client would have earned a profit of approximately RM88,000. The said highest price was recorded at the KLSE within the period for settlement of the purchase price of the said shares. The plaintiff added that but for the defendant's actions, there would not be any sum outstanding to the defendant and therefore the right of the defendant to be indemnified would not arise. The plaintiff further said that the defendant had repudiated the agreement and was not entitled to call on the banker's guarantee.

Puan Muhaiyani, in her affidavit affirmed on behalf of the defendant (encl 8), alleged that the plaintiff had wrongfully placed a purchase order for 44,000 of the said shares. Under cl 4 of the agreement, the defendant, on 16 July 1992, issued a circular to all remisiers on the new arrangements on contra losses and billings to clients. She averred that as a result of the plaintiff wrongfully placing the order on behalf of his client, the defendant, on 14 December 1992, issued a memorandum to all remisiers reminding them of the daily trading limits. She alleged that the plaintiff did not have any credit to support the purchase of the said shares. The plaintiff was terminated as a remisier on 14 January 1993. In para 8 of the affidavit she said:

> ... Pursuant to cl 12 of the remisier's agreement, ... the defendant seeks to exercise their right of indemnity by calling on the bank guarantee ... for the oustanding balance in the plaintiff's account ...

At the inter partes hearing, Mr Julian Ding, counsel for the plaintiff submitted that the banker's guarantee was a form of security given to the defendant. He said that the defendant had acted negligently by force-selling the shares before the expiry of the seven-day period. The price of the shares went up within the seven days. He contended that the defendant was negligent in not following the KLSE rules and was therefore not entitled to claim the indemnity. He then referred to the cases. He submitted that the case of *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] 1 All ER 976; [1977] 3 WLR 764 was wrongly decided. He said that the decisions of the High Court in *Sykt Perumahan Pegawai Kerajaan Sdn Bhd v Bank Bumiputra Malaysia Bhd* [1991] 2 MLJ 565 and *Kirames Sdn Bhd v Federal Land Development Authority* [1991] 2 MLJ 198 are only persuasive authorities. But later in his submission, he said that the *Kirames* case was correctly decided because the terms of the guarantee were very clear. He relied however on *IE Contractors v Lloyd's Bank plc and Rafidain Bank* 51 BLR 5; *Royal Design Studio Pte Ltd v Chang Development Pte Ltd* [1991] 2 MLJ 229; *Hortico (Australia) Pty Ltd v Energy Equipment Co (Australia) Pty Ltd* (1985) 1 NSWLR 545; *Barclay Mowlem Construction Ltd v Simon Engineering (Aust) Pty Ltd* [1991] APCLR 1; (1991) 23 NSWLR 451.

Ms June Khoo, counsel for the defendant, reiterated Puan Muhaiyani's averment in her affidavit. Ms Khoo submitted that the purchase order was wrongly placed by the plaintiff. She said that the plaintiff could not claim liability under the remisier's agreement. According to her, the defendant sold the shares and made a profit. She added that the question whether the defendant could force-sell the shares at the earlier date was being considered in another court. She then referred to the case law. She said that *IE Contractors* did not overrule *Edward Owen*'s case. She said that the present case was concerned with on demand guarantee. She referred to the *Kirames* case at p 201. She also referred to a passage in the judgment of the Indian High Court in New Delhi in *Premier Tyres Ltd v State Trading Corp of India Ltd* (1981) 51 Comp Cas 316 at pp 332 and 333.

It is now necessary for me to examine the cases cited by both counsel which I consider relevant to the present application.

In *Edward Owen*'s case, the performance bond was an unconditional guarantee payable by the bank on demand. The English Court of Appeal decided that the bank was under obligation to pay irrespective of whether or not the person whose performance was granted had in fact performed his obligations or was in default except in cases of fraud of which the guarantor had notice. In his judgment, Lord Denning MR said ([1978] 1 All ER 976 at p 981; [1977] 3 WLR 764 at p 771), 'A performance bond is a new creature so far as we are concerned. It has many similarities to a letter of credit ...'.

Lord Denning said ([1978] 1 All ER 976 at p 983; [1977] 3 WLR 764 at p 773):

> All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice.

In *IE Contractors* 51 BLR 5, Staughton LJ examined the similarities and differences between letters of credit and performance bonds when he discussed the doctrine of strict compliance. In his judgment at pp 9–10, Staughton LJ said:

> The second general principle said to be applicable to transactions of this kind is the doctrine of strict compliance. It is very well established for letters of credit: the documents presented must be precisely those which the letter of credit calls for.
>
> ...
>
> We were not referred to any decision that the doctrine of strict compliance applies with equal force to performance bonds; ...
>
> I agree that there is less need for a doctrine of strict compliance in the case of performance bonds ...
>
> The degree of compliance required by a performance bond may be strict, or not so strict. It is a question of construction of the bond ...

In that case, the terms of the performance bonds issued to the second defendant were as follows:

> (1) we have issued in your favour, as beneficiaries, this letter of guarantee to indemnify you against any damages that you may sustain, up to an amount of ID211,896 (Iraqi Dinars two hundred eleven thousand eight hundred and ninety six only);
>
> (2) covering performance of contract guarantee covering damages which you claim are duly and properly owing to your organization by GKN Contractors Ltd, under the terms of the contract for a slaughterhouse at Duhouk made on 12 June 1978 between you and GKN Contractors Ltd and Ross Poultry Ltd; and
>
> (3) we undertake to pay you, unconditionally, the said amount on demand, being your claim for damages brought about by the above-named principal.

The demand made on all three bonds was as follows:

> In view of the non-discharge by the company of its contractual obligations in making good the deficiencies of the slaughterhouses of Al-Quadisiya, Karbala and Dohuk, we request withdrawal of the under-mentioned guarantees and transference of their amounts to this establishment.

The Court of Appeal decided that the bonds were not to be interpreted as stating that the second defendant would pay if the precise words set out in court were to be found in the demand. The demand stated in substance, although not in express words, that it claimed damages for breach of contract and that was therefore sufficient. Accordingly, the second defendant was liable to the employer.

Staughton LJ in his judgment at p 9 said:

> I take this to show that there is a bias or presumption in favour of the construction which holds a performance bond to be conditioned upon documents rather than facts. But I would not hold the presumption to be irrebuttable, if the meaning is plain.
>
> The second possibility in the *Esal* case [1985] 2 Lloyd's Rep 546 was adopted by Ackner LJ (with whom Glidewell LJ agreed), but not by Neill LJ. This was that the demand had to assert a breach of contract, a result which Ackner LJ described as 'very salutary' (at p 550). I agree that this is a construction which one would wish to adopt, since it requires the beneficiary to state in plain terms that which he must, if honest, be prepared to assert — and may place him in peril of a charge of obtaining money by deception if it is untrue to his knowledge. However, like Legatt J, I doubt whether it is sufficient reason to adopt a particular construction of a commercial contract that the result would be desirable or salutary.

The proposition laid down in *IE Contractors* is found in the judgment of Sir Denys Buckley at p 15. It reads as follows:

> I am in entire agreement with the proposition that to discover what the parties intended should trigger the indemnity under the bond involves a straightforward exercise of construction, or interpretation, of the bond to discover the intention of the parties in that respect. In carrying out that exercise we must, no doubt, have regard to the terms of the bond as a whole, but it seems unlikely that we shall obtain much, if any, assistance in discovering what kind of demand is required to trigger the indemnity from paras 4, 5 or 6. In fact, I think, they provide no assistance.

In *Potton Homes Ltd v Coleman Contractors (Overseas) Ltd* (1984) 28 BLR 19, Eveleigh LJ, in his judgment at p 28, said:

> ... as between buyer and seller the underlying contract cannot be disregarded so readily. If the seller has lawfully avoided the contract prima facie, it seems to me he should be be entitled to restrain the buyer from making use of the performance bond.

In *Barclay Mowlem Construction Ltd v Simon Enginering (Aust) Pty Ltd* [1991] APCLR 1; (1991) 23 NSWLR 451, the Supreme Court of New South Wales decided that a bond incorporating the terms of the building contract could only be called upon if the defendant became contractually entitled to exercise its rights under the contract in respect of the security and that had not been assumed in that case.

In *Royal Design Studio Pte Ltd v Chang Development Pte Ltd* [1991] 2 MLJ 229, the Singapore High Court decided:

> The court, in determining the defendant's entitlement to call on the performance bond, is concerned with the relationship between the parties

A under the main or underlying contract they have made and the dispute arising from such relationship and not whether the bond is binding on the bank or insurance company that issued it. In such a case, there is no reason why the court should be inhibited from exercising its equitable jurisdiction and restraining the defendant from calling on the bond, if the facts warrant it, merely because the bond is like a letter of credit.

B After considering the cases cited above, I must state at the outset that I disagree with Mr Julian Ding's submission that *Edward Owen*'s case was wrongly decided. In that case, Lord Denning explained how he came to the conclusion that a performance guarantee stood on a similar footing as a letter of credit. In my view this still holds true in cases of on demand C guarantees, which was the issue before Lord Denning, as the guarantee he was construing was payable 'on demand without proof or conditions'.

In the *Kirames* case, on a true construction of the terms of the security guarantee, it is clear that the guarantee was also an unconditional and on demand bond. Clause (a) of the guarantee/bond states that the D sum shall be paid by the guarantor forthwith on demand by the beneficiary in writing without the beneficiary having to assign any reason whatsoever for such demand; and cl (b) states that the sum shall be paid forthwith irrespective of whether or not there is any dispute between the said contractor and the beneficiary in respect of and relating to the said contract or in respect of any other matter and irrespective of whether or not such E said dispute, if any, has been settled, resolved, litigated and adjudicated upon otherwise howsoever. The words of the guarantee are very clear and unambiguous that it is intended to be unconditional and payable on demand in writing. In no way can the guarantee be read to incorporate the underlying contract as the obligation to pay is only dependent on receiving F a written demand and not on any terms of the underlying contract. The case of *IE Contractors* was not cited by counsel in the *Kirames* case. Even if the principle laid down in *IE Contractors* had been applied, the result would have been the same.

In the present case, the banker's guarantee is a form of security. The G guarantee document states that the bank guaranteed that the amount stated therein being 'the amount of security deposit required to be deposited' with the defendant. Clause 2(i) of the agreement provides that the plaintiff would place the sum of RM50,000 'which shall be used to guarantee the *due performance by the remisier of the obligations and covenants under this agreement* ...' (Emphasis added.) The defendant accepted the bankers H guarantee in lieu of a cash deposit of RM50,000. In the defendant's letter dated 18 February 1992, it was stated that the banker's guarantee was required as collateral. In *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd (In Liquidation) & Ors* (1978) 141 CLR 335, Gibbs ACJ in his judgment at pp 347–348 said:

I The undertaking of the bank was expressed to be given in consideration of the appellant dispensing with the provision of a retention fund, and was undoubtedly given for the purposes of cl 30(c) of the building contract — it was a 'bank guarantee, guarantee bond or other form of security' within the meaning of that clause. It was therefore intended to be 'effective as

security in lieu of the retention fund', ie effective as security that Mainline should carry out its obligations under the contract — see cl 30(a). Although the liability assumed by the bank was in form absolute, it was, to the knowledge of the appellant, only undertaken for the purpose of affording security for the performance by Mainline of its obligations; the undertaking was collateral in substance, although not in form. The contract between the appellant and the bank appears to fall within the description of 'guarantee' contained in such authorities as *Rowlatt on Principal and Surety* (3rd Ed, 1936) at p 4; *Jowitt v Callaghan* (1938) 38 SR (NSW) 512 at pp 516–517 and *Re Conley* [1938] 2 All ER 127 at pp 131, 135.

In the present case, there is no evidence that a demand had been made on the guarantee, but in its letter dated 7 February 1993, the defendant had indicated that it would draw down on the banker's guarantee.

In my opinion, the banker's guarantee is not an unconditional guarantee. In the circumstances, the court should look at the underlying contract. Clause 6(ii) of the agreement provides that the plaintiff is to indemnify the defendant against all losses where a buying client has failed to pay within the time allowed by the KLSE Rules and where the defendant has to sell in the open market for the same securities and incurs a loss in doing so. Clause 11 provides for the termination of the agreement.

The plaintiff alleged that the defendant had repudiated the agreement and that the defendant had sold the said shares within the seven-day period contrary to the KLSE Rules. Mr Julian Ding contended that there was a breach of the underlying contract in that the buying client did not have the opportunity to buy the shares and that the defendant sold the said shares without the consent of the buying client. Mr Julian Ding also alleged that there was a breach of contract by the defendant in not complying with the seven days stipulated by the KLSE Rules.

The defendant, on the other hand, alleged that the plaintiff did not have any credit to support the purchase of the 44,000 shares. According to the defendant, the plaintiff was subsequently terminated as a remisier on 14 January 1993. Ms June Khoo submitted that the purchase order was wrongly placed by the plaintiff and he could not therefore claim liability under the agreement.

I find that there are serious questions to be tried regarding the conduct of the defendant under the terms of the agreement. Until these questions are decided at the trial, the defendants should be restrained from calling on the banker's guarantee. The balance of convenience is in favour of the plaintiff.

For the reasons stated above, I made an order in terms of the application. Costs in the cause.

Application allowed.

Reported by Anne Khoo